IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL REVISION APPLICATION NO.465 OF 2007

Mr.Dattatray Sadashiv Damle : Applicant

(Orig.Deft. no.1)

V/s.

Vinayak Ramkrishna Vaidya,

through his power of attorney holder

Mr.Vasant Sadashiv Damle & Ors. : Respondents

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Mr.Rajesh P. Behere for the applicant.

Mr.R.D.Suryawanshi for respondent no.1.

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CORAM : S.A.BOBDE, J.

DATE : OCTOBER 18, 2007.

ORAL ORDER

1. The applicant is the defendant no.1 in Regular Civil Suit No.180 of 2004 which was filed on 7.9.2004. In this suit, he made an application under Order XXIII Rule 1(4) that the present suit should be dismissed because an earlier suit, viz., Suit No.82 of 2003 had been withdrawn and that the plaintiff had not mentioned the earlier suit in the present suit.

2. The respondent no.1 filed Civil Suit No.82 of 2003 on

15.3.2003 for an injunction simplicitor. That suit has been withdrawn on 6.11.2004. The learned counsel states that before withdrawing that suit, the respondent no.1 filed the present suit, being Suit no.180 of 2004, hereinafter referred to as the "subsequent suit" on 7.9.2004. That suit is pending. In the subsequent suit, the applicant applied for dismissal of the subsequent suit on the ground that the earlier suit has not been mentioned in the subsequent suit and has been withdrawn. According to the applicant, had the first suit not been withdrawn, the respondent no.1 would not have been entitled for any relief in the subsequent suit because the earlier suit was not mentioned in the subsequent suit. Merely because the earlier suit is withdrawn, the wrong committed by the respondent no.1, viz., of not mentioning the earlier suit in the subsequent suit ought not to be overlooked and the subsequent suit ought to be dismissed.

3. The trial Court which heard the application rejected the applicant’s application on the ground that Order XXIII Rule 1(4) would apply only where both the suits are in existence. Order XXIII Rule 1 reads as follows:-

> **"Withdrawal of suit or abandonment of part of claim**.--(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) .....

(3) Where the Court is satisfied,--

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff--

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

4. In the first place, sub-rule (4) prohibits the plaintiff from instituting a fresh suit where he has withdrawn an earlier suit without permission of the Court. In terms, this rule does not apply where the subsequent suit has already been instituted and the two suits have been pending simultaneously. As in the present case, the subsequent suit has been pending from 7.9.2004 and the present application has been made under Order XXIII on 4.3.2006. The phrase "shall be precluded from instituting any fresh suit" in sub-rule (4) cannot mean that the plaintiff shall also be precluded from continuing the subsequent suit if already instituted. The term "shall be precluded from instituting any fresh suit" is referable to sub-rule (3) which requires a plaintiff to apply for permission to withdraw from a suit with liberty to institute a fresh suit in respect of the same subject-matter. Sub-rule (3) does contemplate a situation where there is only one suit in existence and the subsequent suit is not yet filed. Thus, sub-rules (3) and (4) contemplate the requirement that the plaintiff who has instituted only one suit to seek permission of the Court before instituting another suit and bars a fresh suit which is instituted without the necessary permission.

5. It is true that in the present case, the applicant is

right in submitting that the respondent ought to have disclosed the existence of the earlier suit in the subsequent suit. In fact, by doing so, the respondent has not disclosed that his application for injunction in an earlier suit has been dismissed. It is true that this conduct of the respondent would affect the decision of any discretionary relief which may be prayed for by him in the subsequent suit. It is, however, not possible to accept the contention on behalf of the applicant that the subsequent suit itself cannot be continued any further and is liable to be dismissed because the earlier suit was not mentioned therein and the earlier suit was withdrawn without liberty to institute a subsequent suit. As observed, there was no question of seeking permission to institute the subsequent suit which had already been instituted sometime ago and was pending.

6. This is not to say that several suits may be instituted by a plaintiff on the same subject-matter with impunity. If they are, their continuance would be subject to the provisions of Order II Rule 2, sections 10 and 11 of the Code of Civil Procedure depending on the stage of the suits. However, a subsequent suit is not liable to be dismissed even if it does not disclose that an earlier suit was instituted if the earlier suit has been withdrawn. As observed earlier, the bar in Order

XXIII applies to instituting a fresh suit, without obtaining leave while withdrawing the suit. If, however, a fresh suit has been so instituted without leave, it would be liable to be dismissed provided the first suit is still in existence. In the present case, the first was not sought to be withdrawn when the second was instituted. Order XXIII had no application. As far as one can see, the prohibition is against a plaintiff continuing two or more suits and desisting a defendant to defend all of them. If a plaintiff, however, chooses to withdraw one of them later, it is permissible. What relief a plaintiff would be entitled to because he suppressed the existence of an earlier suit is a different matter.

7. In the result, the impugned order does not call or any interference and the Civil Revision Application is dismissed.

S.A. BOBDE, J.